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No. 06-878

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SUPREME COURT, U.S.

In the Supreme Court of the United States

GERCIE BROOKS, Individually and as Representative of the Estate of JOHN B. BROOKS, JR., Deceased,

Petitioner,

v.

ARMCO INC.,

Respondent.

On Petition for a Writ of Certiorari to the Sixth Court of Appeals of Texas

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent discloses that Armco Inc. merged with AK Steel Corporation in 1999. AK Steel Corporation's parent corporation is AK Steel Holding Corporation, a publicly traded corporation.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF CITED AUTHORITIES iii

RESPONDENT'S BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 4

I. The Affirmance by the Sixth Court of Appeals of Texas of the Trial Court's Decision to Restore a Peremptory Challenge to Respondent did not Erode or Ignore this Court's Jurisprudence in *Batson* and *Edmonson*. 4

II. State and Federal Courts do not Require Additional Guidance from this Court regarding the Restoration of Peremptory Challenges after a *Batson/Edmonson* Violation. 7

III. The Sixth Court of Appeals of Texas was not Confused as to the Harmless Error Jurisprudence of this Court. 10

CONCLUSION 11

TABLE OF CITED AUTHORITIES

CASES:

Batson v. Kentucky,
476 U.S. 79, 106 S. Ct. 1712,
90 L. Ed. 2d 69 (1986) . . . . . *passim*

Brooks v. Armco, Inc.,
194 S.W.3d 661
(Tex. App.—Texarkana 2006, pet. denied) . . . *passim*

Edmonson v. Leesville Concrete Co., Inc.,
500 U.S. 614, 111 S. Ct. 2077,
114 L. Ed. 2d 660 (1991) . . . . . *passim*

Lorusso v. Members Mut. Ins. Co.,
603 S.W.2d 818 (Tex. 1980) 10

Peetz v. State,
180 S.W.3d 755 (Tex. App.—
Houston [14th Dist.] 2005, no pet.) . . . . . *passim*

Perkins v. Freeman,
518 S.W.2d 532 (Tex. 1974) 10

State ex rel. Curry v. Bowman,
885 S.W.2d 421 (Tex. Crim. App. 1993) (en banc)
cert. denied, 513 U.S. 866, 115 S. Ct. 184,
130 L. Ed. 2d 118 (1994) 5, 6, 7

State of New York v. Johnson,
765 N.Y.S.2d 199 (N.Y. Sup. Ct. 2003) 9

Tamburello v. Welch,
392 S.W.2d 114 (Tex. 1965) 10

U.S. v. Ramirez-Martinez,
273 F. 3d 903 (9th Cir. 2001)
cert. denied, 537 U.S. 930,
123 S. Ct. 330, 154 L. Ed. 2d 226 (2002) 8

CONSTITUTION:

U.S. CONST. amend. XIV 4, 7

RULES:

TEX. R. APP. P. 56.1 4

TEX. R. CIV. P. 292 11

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Armco Inc. ("Armco") respectfully requests that the Court deny Petitioner's Petition for a Writ of Certiorari. Neither the Supreme Court of Texas, the Sixth Court of Appeals of the State of Texas, nor the Sixth District Court of Texas has decided a federal question in a way that departs from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power. Despite the allegations of Petitioner, the Sixth Court's of Appeals of Texas did not decide an important question of constitutional law in a way that conflicts with this Court's relevant rulings in *Batson* and *Edmonson*.

STATEMENT OF THE CASE

Respondent owned and operated an integrated steel mill in Houston, Texas from the early 1940's, when it was built and then enlarged as part of the war effort, until 1983 when it was closed. Respondent employed more than 3000 workers, and its plant covered 500 acres in Houston. 6 RR 361.[1] Petitioner's decedent, John B. Brooks, Jr., was employed at the Armco steel mill for more than twenty years and retired in 1982. 3 RR 190. In 1997, fifteen years after his retirement, Mr. Brooks was struck with intestinal cancer. 4 RR 127-29; 136. He was immediately hospitalized for testing and diagnosis and was then given a final diagnosis of "adenocarcinoma". *Id.*

After a short time, Mr. Brooks was discharged from the hospital to a hospice facility where he survived for only a few hours. 3 RR 207. The doctor to whom his care was

[1] "CR" refers to the Clerk's Record, and "RR" refers to the Reporter's Record filed with the Sixth Court of Appeals of Texas.

committed later reported that Mr. Brooks's illness was mesothelioma, a rare cancer frequently associated with asbestos exposure. 8 RR Exhibit 2. However, the evidence at trial suggested that this doctor may have never actually seen Mr. Brooks; 3 RR 206-07; and, there was ample evidence at trial that Mr. Brooks had the more common adenocarcinoma, unrelated to asbestos, as diagnosed by the pathologist at the hospital where he was treated for his final illness. 5 RR 37-38; 43.

Petitioner attempted to prove in the trial court that Mr. Brooks was exposed to asbestos in his employment at Armco and that, because of that exposure, his employer should be found guilty of gross negligence — conscious indifference to his safety — which wrongfully caused his death. The question of whether Mr. Brooks ever had any substantial exposure to asbestos, in fact, was seriously disputed by Respondent. Moreover, Respondent offered substantial evidence of its due care for its employees' safety. 7 RR 100.

After deliberations, the Jury returned a verdict of 12-0 in favor of Respondent. 1 CR 82-83.

During voir dire, Petitioner made a "*Batson* Challenge" when Respondent exercised four of its six, total peremptory challenges as to four of six African-American venire members. 2 RR 101-02. Respondent's counsel provided his race neutral reasons for excusing each of the four individuals. 2 RR 104-07. Counsel made specific reference to the juror questionnaires and his written notes. 2 RR 105-06. With respect to Ms. Kasonya Hicks, counsel made the following statement:

> We exercised a strike on Kasonya Hicks, and quite frankly Mr. Hall talked to Ms. Hicks directly about a

> number of things. And she just didn't seem like she was very pleased at all being questioned by Mr. Hall. And we basically struck her because of the attitude she exhibited towards our side of the case. She also - - and I wrote down she seemed to be bothered by the questions Mr. Hall is asking. And she also is involved in an area of the medical field, and that was a consideration of not wanting her on the jury. Although, we did leave other people on that were in the medical field. That was one of the factors that we came into play when we struck Ms. Hicks.

2 RR 106.

Ultimately, the trial court ruled that three of the challenges would be upheld and one juror, Ms. Hicks, would be restored to the panel. 2 RR 119. The trial court then offered Respondent a replacement challenge.[2] 2 RR 121. The Jury, including Ms. Hicks, voted 12-0 in Respondent's favor. 1 CR 82-83.

On appeal to the Sixth Court of Appeals of Texas, Petitioner raised three points of error concerning the voir dire process. None of these points of error challenged the trial court's decision overruling the *Batson* challenge to the three excluded African-American venire members. The only point of error presented at the Sixth Court of Appeals relevant to the proceeding before this Court was Petitioner's third point of error, which stated "The Trial Court's Decision to Grant Defendant an Extra Peremptory Strike was Improper and Unconstitutional."

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[2] Assuming the "restored" challenge was used, Petitioner made no claim at trial that Respondent used the challenge in a discriminatory manner in violation of *Batson/Edmonson*.

On May 17, 2006, the Sixth Court of Appeals decided the appeal and affirmed the trial court's action. *See Brooks v. Armco, Inc.*, 194 S.W.3d 661 (Tex. App.—Texarkana 2006, pet. denied). On September 22, 2006, the Supreme Court of Texas denied Petitioner's petition for review. Typically, the Supreme Court of Texas looks to several reasons to grant a petition for review. *See* TEX. R. APP. P. 56.1. Included in these reasons is whether the court of appeals has committed an error of law of such importance to the state's jurisprudence that it should be corrected or whether there is a conflict in decisions among or between the court of appeals and the Supreme Court of Texas. *See id.* A denial of a petition for review means the Supreme Court of Texas was "not satisfied that the opinion of the court of appeals has correctly declared the law in all respects, but determine[d] that the petition presents no error that requires reversal or that is of such importance to the jurisprudence of the state as to require correction." TEX. R. APP. P. 56.1(b)(1).

REASONS FOR DENYING THE PETITION

I. The Affirmance by the Sixth Court of Appeals of Texas of the Trial Court's Decision to Restore a Peremptory Challenge to Respondent did not Erode or Ignore this Court's Jurisprudence in *Batson* and *Edmonson*.

The Sixth Court of Appeals of Texas did not commit error in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991), and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by affirming the trial court's decision to grant Respondent an

extra peremptory challenge.[3] In recognizing the discriminatory use of peremptory challenges in *Batson*, this Court did not prescribe a particular remedy for such a violation. The Court left it to state and federal courts to fashion their own remedy. The Court explained that, "[w]e express no view on whether it is more appropriate in a particular case, upon a finding of discrimination . . . for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case . . . or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire." *Batson,* 476 U.S. at 100 n.24, 106 S. Ct. at 1725, n.24 (citations omitted). In light of this statement in *Batson*, the Texas Court of Criminal Appeals stated, "[w]hen a court finds a *Batson* violation, it may fashion an appropriate remedy according to its discretion." *State ex rel. Curry v. Bowman,* 885 S.W.2d 421, 425 (Tex. Crim. App. 1993) (en banc), *cert. denied,* 513 U.S. 866, 115 S. Ct. 184, 130 L. Ed. 2d 118 (1994). *Batson* itself left implementation of its holding to each court in the context of its own jury selection procedure. *Batson*, 476 U.S. at 99, 106 S. Ct. at 1724. This Court did not hold in *Batson* or its progeny that the offending party should be deprived of using the challenges on other potential jurors.

Petitioner makes several allegations in various places in its briefing that the trial court and the Sixth Court of Appeals committed discrimination. At one point, Petitioner states "Here, the trial court committed constitutional error by enforcing defendant's discriminatory challenge." Petitioner ignores the fact Ms. Hicks was restored to the jury. This restoration remedied any possible harm done to the dignity of

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[3] Petitioner incorrectly states the trial court restored "peremptory strikes." The trial court only restored one challenge.

the person and the integrity of the courts. With the restoration of Ms. Hicks to the jury, the Sixth Court of Appeals stated that the "jury was not selected by racially discriminatory means." *Brooks*, 194 S.W.3d at 667. Petitioner then complains that the trial court and the appellate court gave Petitioner a "free pass" on its discriminatory conduct. Again, such an argument ignores the fact that a juror whom Respondent believed to be hostile to Respondent was placed on the jury. *Batson* and its progeny allow the court the discretion to fashion a remedy for a violation. The trial court's remedy was to replace Ms. Hicks on the jury. Petitioner is arguing that the court's remedy was not harsh enough on Respondent. Such an argument ignores this Court's opinion in *Batson* as well as the discretion the trial court has to remedy a violation.

Petitioner relies heavily on *Peetz v. State*, 180 S.W.3d 755 (Tex. App.—Houston [14th Dist.] 2005, no pet.), to argue how the trial court should have handled the remedy of the *Batson* violation. *Peetz* involved a remedy for *Batson* violations that occurred in a hate crime trial that is almost exactly opposite the situation faced in the present case. *Id.* at 757. *Peetz* involved the denial of additional challenges to replace challenges lost during a *Batson* violation. *Id.* at 760. In *Peetz*, the Court ruled "[t]he court appropriately fashioned a remedy that would penalize counsel for unconstitutionally exercising peremptory strikes: she empanelled wrongfully-struck jurors and refused to allow counsel to reuse these strikes, thereby putting other litigants on notice of the unwanted consequences of improperly using a peremptory strike." *Id.* at 760-61. However, Petitioner ignores two key points of *Peetz*.

First, the *Peetz* court stated that when a court finds a *Batson* violation, it may in its discretion fashion an

appropriate remedy. *Id.* at 760; *see Bowman*, 885 S.W.2d at 425. Ultimately, it is clear that any remedy is left to the Court's discretion. In this instance the allowance of an extra challenge was left to the discretion of the trial court. Petitioner never demonstrated on appeal how the trial court abused its discretion in fashioning such a remedy. Second, Petitioner ignores the fact that the *Peetz* court does not require future courts to mandate the loss of peremptory challenges as a remedy for a *Batson* violation. The *Peetz* court stated "[i]f a trial court refuses to restore misused strikes, litigants truly face a consequence and are less likely to engage in improper, racially-motivated behavior. Such a remedy, *though not required*, is acceptable." *Id.* at 761 (emphasis added). In the present case, the trial court and the Sixth Court of Appeals for Texas decided that such a remedy was not required. Such a decision is not inconsistent with the holding in *Peetz*. The decision does not violate *Batson*, *Edmonson*, or the Equal Protection Clause of the Fourteenth Amendment.

II. State and Federal Courts do not Require Additional Guidance from this Court Regarding the Restoration of Peremptory Challenges after a *Batson/Edmonson* Violation.

Further, in an attempt to have this Court grant its writ, Petitioner claims the few opinions addressing the restoration of peremptory challenges after a *Batson* violation are somehow inconsistent and require guidance from this Court. In making this argument, Petitioner relies on four opinions, a United States Court of Appeals opinion, the *Peetz* and *Brooks* opinions from the Courts of Appeals of Texas, and a criminal trial court opinion from New York. However, all four opinions are consistent in allowing the trial court to use

its discretion in determining whether or not to restore the peremptory challenges after a *Batson* violation.[4]

The United States Court of Appeals for the Ninth Circuit held that the district court appropriately exercised its discretion when it remedied a *Batson* violation by returning the previously excused jurors to the venire and by returning the two objectionable peremptory challenges to the government. *See U.S. v. Ramirez-Martinez*, 273 F.3d 903, 910 (9th Cir. 2001), *cert. denied*, 537 U.S. 930, 123 S. Ct. 330, 154 L. Ed. 2d 226 (2002). The Court of Appeals opinion focused on whether the District Court's remedy was within its discretion. *Id.*

Texas law is consistently clear on the issue — the trial court has the discretion to fashion its own remedy for a *Batson* violation. In *Peetz*, *supra*, the Fourteenth Court of Appeals focused on whether the trial court abused its discretion by refusing to allow counsel to reuse its peremptory challenges after a *Batson* violation. *See Peetz*, 180 S.W.3d at 760. As previously discussed, the court stated that such a remedy was left to the trial court's discretion — the trial court could properly prevent a party from reusing its peremptory challenges, but a trial court was not required to prevent a party from reusing its peremptory challenges. *Id.* at 761. Likewise in *Brooks*, the Sixth Court of Appeals follows the holding in *Peetz* in allowing the trial court to have the discretion to fashion a remedy for a *Batson* violation. *Brooks*,

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[4] Petitioner also contends that the courts have come to varying conclusions on the constitutional propriety of the practice of restoring peremptory challenges after a *Batson* violation. However, such a contention is misleading because none of the courts focuses on the constitutionality of the practice--only whether the actions were an abuse of the trial court's discretion.

194 S.W.3d at 666. The Sixth Court of Appeals then distinguishes the facts in *Brooks* from the facts in *Peetz* in an attempt to justify the less severe remedy fashioned by the trial court. *Id.*

The trial court opinion from the Supreme Court of Kings County, New York analyzes whether it has the discretion to refuse to allow a party to reuse its peremptory challenges after a *Batson* violation. *See State of New York v. Johnson*, 765 N.Y.S.2d 199, 201 (N.Y. Sup. Ct. 2003). The court found that it had the discretion to disallow the reinstatement of the peremptory challenges. *See id.*

In making its decision, the New York trial court stated that the refusal to reinstate peremptory challenges is not only appropriate but necessary in the face of "purposeful discrimination." *Id.* Petitioner ignores two things in making this argument. Petitioner ignores the fact that the Supreme Court of Kings County, New York is a trial court and is not a state court of last resort in the state of New York. The trial court's decision was not appealed to either the Appellate Division or the Court of Appeals for New York. The appellate courts of New York are silent as to whether it is permissible for a trial court to refuse to allow the reuse of peremptory challenges. Second, Petitioner ignores the fact that all the courts who have ruled on this issue have followed the same consistent analysis in making the decisions whether or not to restore the peremptory challenges after a *Batson* violation. The courts all have found the trial courts were within their discretion to fashion an appropriate remedy.

It is clear this Court left it to the discretion of the states to fashion remedies for *Batson* violations. The federal and state courts cited by Petitioner are not in conflict on this issue.

There is no need for further guidance from this Court on this issue.

III. The Sixth Court of Appeals of Texas was not Confused as to the Harmless Error Jurisprudence of this Court.

The Sixth Court of Appeals of Texas did not commit error in its analysis concerning the trial court's decision to restore a peremptory challenge to Respondent. Petitioner states that equal protection takes priority over the right to peremptory challenges. However, Petitioner fails to cite any cases holding that granting an extra peremptory challenge after a *Batson* violation is a violation of equal protection or inconsistent with the opinions of this Court in *Batson* and its progeny.

Because there are no opinions holding the restoration of a peremptory challenge violates equal protection, the Sixth Court of Appeals was correct in applying long standing Texas law in deciding whether there was error in the allocation of peremptory challenges. Under existing Texas law, in a situation involving the granting or refusing of peremptory challenges, the complaining party must show that the error made the trial materially unfair. *See Brooks v. Armco, Inc.*, 194 S.W.3d 661, 667 (Tex. App.—Texarkana 2006, pet. denied). This standard has been Texas law for the last forty years. *See Lorusso v. Members Mut. Ins. Co.*, 603 S.W.2d 818, 820 (Tex. 1980); *Perkins v. Freeman*, 518 S.W.2d 532 (Tex. 1974); *Tamburello v. Welch*, 392 S.W.2d 114 (Tex. 1965).

The Sixth Court of Appeals concluded that Petitioner could not meet this standard because the trial court verdict was unanimous, 12-0, in favor of Respondent. 1 CR at 81-82. The restored peremptory challenge had no impact on the

verdict. In all but one instance, where the jury is originally composed of twelve jurors, a minimum of ten members of the original jury must concur in the verdict. *See* TEX. R. CIV. P. 292. Thus, jury verdicts that are 10-2, 11-1, and 12-0 are verdicts for the defendant. Had the trial court failed to give Respondent an extra peremptory challenge and had one vote been cast the other way, the ultimate result of the verdict would have been the same. Petitioner cannot demonstrate the trial court's decision made the trial materially unfair because the jury rendered a 12-0 verdict in favor of Respondent. 1 CR at 81-82.

CONCLUSION

For all the foregoing reasons, Petitioner fails to demonstrate that her petition qualifies or merits review in this Court. The opinion of the Sixth Court of Appeals of Texas does not conflict with governing Supreme Court precedent. Accordingly, Respondent respectfully submits that that the petition for writ of certiorari should be denied.

Respectfully submitted,

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